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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 16

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners respectfully petition for a rehearing in this unusual case, and, if necessary, re-argument. This petition is lengthy because the facts are complex.

The legal questions as to (1) admissibility in a federal criminal trial of an exaggerated confession obtained in a context of believed immunity from prosecution, and (2) the degree of willful "exaggeration" permissible in Government evidence in federal prosecutions, are not complex. They should not have led to the bitter cleavage shown by the present opinions which we feel stems from a miserable and mortifying failure on our part to make the facts of the record clear to the present majority of the Court.

Inherently and explicitly the present majority opinion is bottomed upon *an original finding of fact by this Court* that Huebner, at the reopened hearing, corroborated Lubben's trial testimony to the jury of a gross of $454,000 save for "$32,000 to $57,000" (Op. p. 14). It is that assumption of fact, which goes far beyond anything found below, which leads to the crushing conclusion of gross fraud by petitioners on which Parts I and II of the opinion are founded.

We attach hereto a reproduction of a chart *prepared by the Government* at the conclusion of the remanded hearing which demonstrates that the disparity between Lubben before the jury and Huebner on the supplemental hearing, is not the mere $32,000 to $57,000 erroneously assumed by this Court, *but actually is over $250,000.*

It well may be that we should have stressed the facts more, and the law less, in our briefs and should have set forth there the tabulation which is annexed hereto. But whether the blame should attach to us for not driving the facts home here, to the District Court for making vague findings[1] which have confused this Court, or to counsel for the Government who made insupportable assertions of fact, the result is that citizens now stand to go to the penitentiary under an opinion that is bottomed upon a gross and demonstrable misunderstanding of the record.

1. The District Court found that Huebner's testimony was "reasonably consistent and compatible" with the trial testimony (App. 1758); "Huebner may be mistaken as to the exact amounts"; "that Lubben may have exaggerated the amounts * * * is entirely probable"; "substantial sums [were] paid * * * totalling between $300,000 and $400,000". (App. 1758); "* * * good faith does not turn on the exact amount of Lubben money Huebner, Sullivan or Cain may have received * * *" (App. 1759); "It is not particularly important to determine * * * the exact period of the existence of the corn box or the exact amount of Lubben's money that was used to purchase raw corn." (App. 1763.) There is no place in the District Court's findings (Order on Rehearing re Suppression; App. 1754, et seq., where this Court can get its hands on any definite figures.

This, we are confident, no member of the Court wants whatever his views as to the law may be.

Therefore, we respectfully request that the case be re evaluated in the light of the facts herein contained which, we submit, make it impossible to adhere to an opinion premised upon belief that there was a mere "$32,000 to $57,000" variation between Lubben and Huebner. For, as the Solicitor General said in *Mesarosh v. U. S.*, 352 U. S. 1, 19, n. 7, "* * * it is never too late to try to do justice." If the opinion is recast to eliminate the factual misconception on which it is based the case is put in a far different light. We believe the Court will then be able to award petitioners a new jury trial. Nor should it be embarrassing to any member of the Court to change his position on ultimate disposition of the case where his original position was based upon a serious misconception of fact.

TREMENDOUS DISPARITY BETWEEN LUBBEN TESTIMONY TO THE JURY AND HUEBNER TESTIMONY.

At the conclusion of the reopened hearing Government counsel furnished a tabulation purporting to compare Lubben's (and related) testimony given to the jury, with that of Huebner at the new hearing. Photostatic reproduction of it is annexed as Appendix A hereto. (The handwritten material or notes appearing on the reproduction were made by us in originally working with the document and we have been unable to erase them for purposes of preparing the annexed copies.) In examining this tabulation it is important to note the column headed "Paid To" denoting the supposed receiver of the payments *as testified to by Lubben.* In nearly every instance it will be seen Lubben claimed he paid the money *to Huebner.* This table demonstrates beyond doubt that *Lubben testified he gave to*

Huebner the following payments which Huebner either denies, or fails to corroborate:

Approximate Time	Amounts of asserted payments to Huebner He Did Not Receive
Feb. 7, 1945	$ 6,183.00
After check dated March 6, 1945 was cashed	18,000.00
June 28, 1945	5,524.00
Between Sept. 28 and Nov. 27, 1945	47,000.00
Close to Xmas, 1945	10,000.00
Somewhere in the neighborhood of early March 1946	16,825.00
Unbilled shipments Bills of Lading Govt. Exhs. 151 and 152 dated 5-22 and 6-8, 1946	27,322.67
Unbilled shipment of Aug. 9th Bill of Lading Govt. Exh. 154	23,178.12
Settlement for shipments July 22 to Aug. 14, 1946	29,519.63
Oct. 14 (1) On or about day check was cashed, and (2) Around Oct. 12	22,235.00
Nov. 1946	2,004.00
On or about date check was cashed (Nov. 9, 1946)	319.50
Total Lubben said he gave to *Huebner* to which Huebner does not agree	$208,101.92

In addition Lubben was contradicted as to two items totalling $49,076.51, which Lubben said he gave *to Graflund*, which payments are denied by both Huebner (App. 856) and Graflund (App. 1145). Thus the conflict to be resolved

between *Government* witnesses, *vis a vis* Lubben, encompasses items totalling $257,178.43.

The reality of this contradiction and the complete irreconcilability of the versions of Huebner and Lubben is emphasized by the fact that Huebner did not claim that Lubben may have made substantial payments to him which he did not recall. For example, Huebner testified that in January, 1945 Lubben delivered between $10,000 and $11,000 to him at the Pennsylvania Hotel in New York (App. 586). He was then asked "Q. What is the amount of *the next over-the-counter currency payment that you actually received from Mr. Lubben in 1945?*", and answered that it was $15,000 which he received in the latter part of March, 1945 (App. 590-591). If the Court will examine the table set forth above, or the exhibit at the back of this petition, it will see that thereby Huebner denied and wholly excluded payments Lubben claimed he had made *to Huebner* in the sum of $6,183 about February 7, 1945 and $18,000 shortly after March 6, 1945.

Huebner purported to confirm (by badly impeached testimony) Lubben's claim that he had paid Huebner an aggregate of approximately $25,000 around the first and the latter part of May, 1945. He then was asked:

> "Q. *When was the next time* in 1945 that you received a currency payment from Mr. Lubben?"

He answered:

> "A. Somewhere in December of 1945."

at which time he said he got between $18,000 and $20,000 (App. 603, 605). Lubben, however, had testified that he paid Huebner $66,000 between September 28 and November 27, 1945. This particular discrepancy therefore is $47,000, which is the figure shown on the table set forth above. (See also top horizontal section page 2 of annexed exhibit.)

Additionally, Heitman (Lubben's factory superintendent) testified to the jury that he paid $10,000 for Lubben to Huebner near Christmas 1945. Huebner did not confirm this at all.

Thus one may go through the various items and necessarily must arrive at the discrepancy we have set forth of $208,000 to which must be added the $49,000 which Lubben claimed he paid to Graflund and which both Graflund and Huebner deny.

There are two reasons why this wide conflict between Lubben and Huebner, or between trial and new hearing, cannot be washed aside by any claim that Huebner might have "forgotten" some payments. *First*, Huebner did not so claim. Repeatedly he stated positively, after testifying to some specific payment, that the "next" payment he got was in such an amount on such an approximate date, thereby denying intervening payments Lubben claimed had been made to him. *Second*, the Lubben claims of payments were so large that it is impossible, if they in fact had been made, that Huebner could have forgotten them. A man simply can't forget $208,000.

The severity of this contradiction is even more striking when it is realized that in preparing Huebner to testify Government agents and attorneys had before them a tabulation of Lubben's 1953 testimony essentially like that in the annexed Appendix, or as set forth at page 19 of Brief for the United States in this case (App. 765). They took Huebner through it item by item. Sometimes Huebner said he "didn't remember" receiving the money that Lubben claims had been paid, at other points he said he didn't think he got it at all. Examples appear at App. 760, 763-4, 773, 808, 839-40. Government counsel squeezed every bit of corroboration out of Huebner they possibly could. Yet, taking Huebner's testimony at full value the tremendous disparity we have indicated above exists.

And the Huebner evidence itself must be discounted for it plainly "exaggerated" the amounts even he testified to—it is, *as the District Court found*, shot through with "glaring inconsistencies and contradiction" (App. 1768-9). Thus Huebner originally said that overages started at the rate of 5¢ a pound, but later switched and said it was 10¢ (App. 750, 770); he first said he never got any money personally until September of 1945 and he didn't know how much (App. 771-2), but then turned around and said he got $5,000 in March 1945 (App. 591) and $10,000 out of an asserted $30,000 payment in early May 1945, out of which he originally said he got nothing (App. 775-779). It is impossible either to reconcile Huebner's testimony internally or to bring it within $200,000 of Lubben's.

The gross factual misapprehension this Court has labored under can be demonstrated in another way:

The present opinion, in making its finding that the variance is only $32,000 to $57,000 does so *by adding to the sum it believes Huebner testified to receiving*, "$125,000 to $150,000" of "corn box" money, as though such funds were received for Shofwell by *someone other than Huebner*. However, Appendix A demonstrates that *every payment was to Huebner* except a minor one to Mrs. Krasne and two to Graflund which Graflund (App. 1145) and Huebner (App. 856), testifying as Government witnesses, denied Lubben made. There simply is no "some $125,000 to $150,000 that must be added to this $272,000 total" (Op. pp. 13-14). **If this $125,000 to $150,000 was not paid to Huebner, it was not paid at all.** This is indisputably clear from the column "PAID TO" in the Government schedule reproduced as Appendix A.

This error, of adding $125,000—$150,000 to Huebner's testimony, is indisputably clear if the problem be viewed from another angle: the testimony always has shown that some such approximate sum went through the corn box. The

money *was* there; it *was* expended[2] and the source of the money (save for a temporary loan of $14,000 from the Officers' account) *was* Lubben.

There is not a scrap of evidence of production of money for the corn box in any amount (save for the loan of $14,000) from any source *other than Lubben*. It is, therefore, logically and testimonially impossible to assert that what was spent for corn must be *added to* whatever Huebner claims he got from Lubben. Fifteen years of intense investigation and eleven years of litigation have failed to reveal any other possible source of the money that went through the corn box other than Lubben.

Whatever went through the corn box *must be included within* whatever gross sum one may believe Lubben paid, and is to be *deducted from* that sum rather than *added to it* in seeking to determine whether Cain and Sullivan possibly could have received the sums attributed to them.

The *addition*, by the opinion, of this $125,000 to $150,000 is wholly unjustified and necessarily means that the present opinion's conclusion as to the amount of the variance *understates the variance by that amount—$125,000 to $150,000.* The correction of this single factual error alone, even if no other figures in the present opinion be changed, *necessarily results in a mean, or average variance figure of approximately $182,000.*

The final effect of the variance and the tremendous injustice done petitioners may be demonstrated in still another way:

Huebner testified he received $272,000 from Lubben in 3 years. Of this, he says $28,000 was in 1944, (not involved in the indictment), and was not "pocketed" but was expended for some company purpose he does not recall. (App. 583-

2. Note for example that Huebner testified that one middleman alone got around $75,000 on corn deals. (App. 785.)

5.) Huebner says he personally got $45,000, most, but not all, of it with knowledge of Cain and Sullivan. (Cain and Sullivan deny such knowledge.) Huebner says $30,500 of what he claims he turned over to Cain (App. 636-638) was spent on an apartment for one Gael Sullivan (no relation) and, whether deductible or not, this sum certainly was not "pocketed" by Cain and Sullivan. Certainly at least $125,000-$150,000 was spent for corn and, as we have demonstrated, *had* to come from these funds. And Huebner certainly "exaggerated" to some degree in his conflicting testimony—let us say 10% (and we are charitable). Moreover, when the corn box was closed $5,900 remaining in it was carried into the company accounts and accounted for as income. (R. 782.)

The unavoidable mathematical result is:

Receipts		
Gross paid by Lubben (according to Huebner)	$272,000	
Deduct 10% "exaggeration"	27,200	
		$244,800
Disbursements		
Spent in 1944 for "company purpose"	$ 28,000	
Huebner	45,000	
Corn	137,500	
Apartment	30,500	
Balance carried into corporate books	5,900	$246,900

The foregoing is *taking Huebner at face value* except for a 10% reduction for his own exaggerations and "glaring inconsistencies". This tabulation demonstrates that if Huebner be substantially believed, but if the unsound, wholly unproved assumption that the money for corn

came from some place other than Lubben's payments, be discarded, there was a *deficit* in the operation; certainly there was no $400,000 for Cain and Sullivan to have put the "greater part of" in their pockets.

The foregoing figures, of course, are not precise or exact (with the exception of the $5,900 which actually was carried into the company's accounts), **but they should forcefully impress any court that Messrs. Cain and Sullivan were not talking fiction when they denied they ever personally profited from these transactions.** The foregoing accounting can be changed to some degree by taking either the low figure of $125,000 for corn, rather than the median of $137,500, or, by taking a figure of $150,000 to $160,000. (The Government virtually agreed in the Court of Appeals on the first appeal that the latter figure was not an unreasonable estimate.) And it may be said that no deduction should be made for Huebner's exaggeration. But however the account be adjusted, it is clear that Cain and Sullivan have a strong case; that it is impossible they could have put "the greater part" of $400,000 in their pockets; that something in line with the foregoing tabulation accords with the facts; that Cain and Sullivan should have, in fairness and for all of the reasons pointed out in the dissent, the right to have a jury pass upon these facts.

And once more, it was the refusal of the District Court to make detailed, down-to-earth fiscal findings, but instead to resort to sweeping, loose generalities and condemnations, that led this Court to act upon non-existent factual premises and from them to conclude that Cain and Sullivan are fraudulent villains, when they are nothing of the kind. We suspect our initial criticisms of Judge Nordbye did not sit well with the present majority of the Court. Nevertheless, the liberty of citizens of heretofore unblemished reputation is now at desperate stake. The sad fact remains that the unavoidable detailed facts and compar-

isons we make here were always apparent and cannot be denied. The District Court did this Court no favor when it buried these simple fiscal, or accounting facts in an avalanche of general condemnation and said it was not necessary to determine when the corn box opened, what passed through it, etc. (See App. 1763 and opinion note 11.)

The significance of the tremendous variance between what the jury heard and what the Government, by Huebner, now says is the truth, is that the disparity is very real and not merely "apparent." It is unthinkable that American justice could tolerate sending citizens to the penitentiary where the Government first produced testimony before a jury, which the District Court found the jury believed, that petitioner Shotwell received $454,000 gross income, but in a separate hearing proved by other witnesses, which it also asks the Courts to believe, that the amount of gross income was actually some $182,000 less than was told to the jury. Surely a fresh jury trial on untainted evidence is required.

UNFORTUNATE RELIANCE ON GOVERNMENT BRIEF

In arriving at the erroneous conclusion that the disparity between Lubben and Huebner "is more apparent than real," the opinion states (p. 13) that on the new hearing Huebner "was never asked to say whether [the payments he said he got] were the only Lubben payments he himself received." The opinion also states (p. 13) that Huebner was "not the only person in the Shotwell organization who had received Lubben money." The inference is that some unspecified sum paid to Huebner beyond what he "admitted" receiving, and a further sum, or sums, paid to some other unspecified person or persons, should be added to what Huebner said he got.

In advancing those contentions *the opinion proceeded*

without benefit of findings to like effect by the District Court" and relied upon unsupportable arguments in the Government's brief (p. 29), plus such examination of the record as the Court was able to make. The Government brief led the Court into a gross misconception of the record, as we now demonstrate:

1st. Huebner was not asked whether the payments he "admitted" receiving from Lubben were the only ones he received, because *it was not necessary so to do.* The Huebner testimony, as he gave it, *precluded any other payments.* The prosecutor had promised the District Court, Huebner would tell "everything that happened in his transactions with Lubben" (App. 572). It was not claimed, nor did Huebner testify, that there were *other* payments he had not told about.

2nd. There is not a scrap of evidence that Lubben actually paid money to any persons *other than Huebner and Grafland!* (See Government's own tabulation appended hereto.) Roeser and Mrs. Morrill, Shotwell employees, who at times had access to the "corn box" and *physically handled* some of the money, testified as *Government* witnesses before the jury in 1953. *Roeser never testified to receiving money independently of Huebner.* As a custodian of the corn box he described procedure under which Lubben would bring money to the plant, see Huebner, and then *Huebner and Lubben* would turn the money over to Roeser (R. 1705-1707). And Roeser's testimony is effective contradiction of Huebner's new assertion that these payments went into the

3. It is true that the District Court found that "Huebner may be mistaken as to the exact amounts of money received and when the payments were received," but that observation, in the context of the hearings, trial briefs and opinion was not a finding that Huebner might have received *more* than he testified. Rather, it was a guarded recognition of petitioners' strenuous arguments that he got *less*; it was partial recognition of "the glaring contradictions and inconsistencies" in Huebner's various versions, all tending to show that the amounts he actually received from Lubben were considerably less than the sums he finally claimed.

pockets of Cain or Sullivan. Mrs. Morrill did not testify to *receiving* any payments in any fashion. Her connection with the money was, "Only by assisting in counting, sometimes giving it to somebody in the office who might ask me for it." (R. 780). Huebner's testimony on the remanded hearing that he "directed" Roeser, Mrs. Morrill and Graflund to "receive" payments from Lubben is quite consistent with Roeser's version that Huebner would bring *Lubben and the money* to Roeser and request him to take custody of it. It does not establish the existence of independent payments to anyone. Roeser and Mrs. Morrill were examined again by the 1956 grand jury and if the fact was that they had been independent recipients of any payments, they would have been produced before Judge Nordbye in 1958. The "other payments, to other people," theory is myth which has no place in a criminal prosecution where a citizen's liberty should be endangered only by substantial evidence.

We humbly suggest that the majority on the present opinion has permitted itself, contrary to prior teachings of this Court, to act as a primary fact finder on an excessively complicated record in which "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them" (*Holland* v. *U. S.*, 348 U. S. 121, 128). This Court is "* * * ill-equipped for such a task." (Harlan J., in *Mesarosh* v. *United States*, 352 U. S. 1, 23). In making the findings of fact we have criticized the majority relied on assertions in the Government brief as to the proofs. Those assertions were invalid. It may be that the undersigned should be criticized for not exposing these particular errors in the Government's presentation in our original briefs. If so, the criticism should be visited upon us, and not upon our clients by imprisonment upon a non-existent factual basis.

And certainly the Government is in neither moral nor legal position to complain, if, on rehearing, the Court corrects mistakes the Government itself led it into.

THE EFFECT OF THE MISCONCEPTIONS UPON THE OPINION

The opening portion of the opinion (p. 3) accepts the District Court's finding that fraud had permeated petitioners' "disclosure showing" both at the suppression hearing "and the trial" (*sic*). It says that such ultimate finding,

> " * * rested primarily on subsidiary findings that although Shotwell's black-market *receipts* had not in themselves been misrepresented, the claim that they had been almost entirely offset by *payments* for the purported purchase of black-market supplies was false — the truth being (contrary to what petitioners Cain and Sullivan had testified in the earlier proceedings) that most of Shotwell's black-market receipts 'totaling between three and four hundred thousand dollars,' had found their way into the pockets of Cain, Sullivan and Huebner. * * * "

The foregoing underlies both Parts I and II of the opinion. There are two steps to the chain of reasoning. *First*, a belief that a very large sum of money was paid by Lubben which, while not precisely what Lubben had claimed, was not too far from it. This is based upon the assumption that there was no great disparity between the Lubben and Huebner testimony. We have shown the error of that above. *Second*, the "greater part" of this undetermined, but very large, sum was appropriated by Cain, Huebner and Sullivan for their personal use. It is this believed fact that Cain and Sullivan "pocketed" large sums that impelled the conclusion petitioners were guilty of fraud. We observe in addition to the factual matters above set forth:

1. No issue of what assertedly went into petitioners' pockets was mentioned when the case was here before (355 U. S. 233).

2. Huebner's affidavit lodged with this Court to procure the remand raised no assertion that money went into petitioners' pockets.

3. The opinion in 355 U.S. was plain that no question going to the merits of any tax case, corporate or personal, was to be decided upon remand, saying at p. 244:

> "We should not lose sight of the fact that the Government's new showing does not relate to an issue submitted to the jury in the proceedings below, but rather to a preliminary question as to the admissibility of evidence. Hence to grant the Government's motion is not to permit it to 'bolster' the evidence upon which the verdict of guilty was returned by the jury in this case."

It is only because the Opinion finds that much money went into the pockets of Cain, Sullivan and Huebner that it makes the following findings in which inhere evaluation of wilful intent classically the exclusive province of a jury:

> "* * * the disclosure 'was fraudulently contrived'" (p. 4).
>
> "* * * their disclosure was fraudulent" (p. 5).
>
> "* * * a fraudulent disclosure had been depended upon" (p. 7).
>
> "* * * the facts disclosed were deliberately misrepresented." (p. 8).
>
> "* * * no full and honest disclosure was ever made" (p. 9).
>
> "* * * petitioners attempted to hoodwink the government" (p. 10).

Findings of *mala fides* and criminal intent such as the above are, in criminal matters, jury questions.[4]

Petitioners have always insisted—and never waived—

4. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Morissette* v. *U. S.* (1951), 342 U. S. 246, 274.

that any question of money going into their pockets was not raised by the indictment and in any event would be a jury question, if, and when raised. It has been raised in the companion conspiracy indictment discussed at p. 20 *infra*, *which petitioners still face*. But on the trial of *this* case the law was stated thusly to the jury:

> "I charge you that to the extent that you find from the evidence that any cash payments for overages were received by individual defendants for their own benefit, then to such extent such payments would constitute income to such individual defendants and did not constitute taxable income to The Shotwell Manufacturing Company." (R. 2968.)

When on remand it became plain the Government wanted to offer this Huebner claim of money going directly to Cain and Sullivan, petitioners continually insisted this was a jury question; and was one which would tip the case upside down (See next heading). At App. 391 the District Judge said:

> "* * * if the evidence substantiates a finding that instead of paying out $345,000.00 for corn, a very substantial part of that money was diverted to others, then it may bear upon the question of the good faith of the so-called voluntary disclosure."

To this counsel for petitioners objected:

> "If you are going to hear and decide on this hearing how much came in and how much went out, then you are going to try the issue in chief of the whole case. That, of course, we think is not within the scope, and in deference to your Honor, we don't think you really intend to do that.
>
> "By the Court: No, I can't say that I have determined the limits of the scope of the inquiry."

To an expression of the Court that he would hear the asserted proof of money that went "into the pockets of any of these defendants" defense counsel objected (App. 405-

411) that a jury question was involved. *Semble*, App. 571, 1028, 1781.

Petitioners, upon the present opinion, are to go to prison because a court, not a jury, believes that upon the merits of where the money went, *as buttressed by the new evidence*, the defense was fraudulent. This judgment is reached on evidence given on remand by Huebner and never heard by a jury. This new evidence, coming solely from Huebner, was factually controverted.[5] Before it can properly be weighed petitioners are entitled to have a jury pass on it.

5 For example, Huebner said he gave cash twice to Sullivan. The first time, he said, was in 1945 (App. 603) in the cold of winter (App. 847); but before the Grand Jury he testified it was in 1946, in the heat of summer (App. 919-920); he said he got the money from either Lubben or Moran (App. 603) but later didn't remember getting any money from either, at the time in question (App. 842-3). He said Sullivan put the money in the members' vault at the C. A. A. (App. 846-7) but the vault records showed Sullivan didn't use the vault except once, four years later (App. 1604-5). The only other payment to Sullivan, Huebner said, was in February 1946 when Sullivan was in St. Joseph's Hospital with a penicillin rash (App. 848-9); the hospital records showed Sullivan's stay at St. Joseph's for penicillin rash was three years later, in 1949 (App. 848). Huebner said he had gotten the money from Lubben in February 1946 (App. 618) but as the Government's Brief here shows in its table at p. 39, Lubben says he gave nothing to Huebner from 11/27/45 to 3/25/46. On cross-examination Huebner admitted he got no cash from Lubben *at all* in February 1946 to give Sullivan or anyone else (App. 850). There were similar contradictions as to claimed payments to Cain. As examples, Huebner testified he got $30,000 at the Sherman Hotel from Lubben, gave it to Cain at the Belden Stafford, and Cain gave him $10,000 (App. 598-600); on cross-examination it was shown he had previously testified the envelope was sealed, he did not know how much money was involved and he got none of it (App. 777-8) and he never got more than $5,000 at one time (App. 951). Other examples of Huebner's testimony being in "hopeless internal conflict" (*Blackburn* v. *Alabama*, 361 U. S. 199, 209) could have been argued to this Court, but those fact questions we believed proper for a jury or a new trial, rather than for this court of review.

THIS COURT'S FINDING IS INCONSISTENT WITH THE VERDICT OF THE JURY.

In the unusual procedures of this case an amazing thing has occurred:

1. The trial to the jury was conducted on the theory that everything Lubben paid, went to, and was taxable to, the Shotwell corporation. The District Court instructed the jury that to the extent they believed that any of the cash payments were received by individual defendants for their own benefit then they would constitute income to them and *not income to the corporation.* To bring in a verdict the jury *had* to believe quite contrary to the present finding, that "the greater part" of the Lubben payments *went to Shotwell;* the verdict can be sustained only upon the basis that there was fair, "unexaggerated" proof of *such corporate income* beyond a reasonable doubt.

2. But six judges of this Court now find that petitioner should go to prison on precisely the contrary premise, namely, that the greater part of the payments *went to the individuals* for their own personal use and that what little Shotwell did get, it expended for corn.

This Court's finding of fact and the jury's are, therefore, mutually inconsistent.

The Government cannot have it both ways. *If* it is the Government's contention that the greater part of Lubben's payments went to the individuals then the verdict which the Government obtained by convincing the jury that the greater part of the payments went to Shotwell was improperly obtained and must be set aside. On the other hand, if it is the Government's contention that the jury was correct that the greater part of the Lubben payments went to Shotwell, then this Court's finding that petitioners did not make a fair disclosure is patently invalid.

The fact of the matter is that the Government procured an indictment and tried this case on one theory—corporate tax evasion—and then in 1956 or 1957 changed its theory and decided what petitioners really were guilty of was personal tax evasion. That new theory, which in substance is adopted by the instant opinion, is embraced in the conspiracy indictment brought against petitioners in 1957, to which we will refer, and which will have to be fought out before a jury in that case.

We contend that *neither* Government theory is sound but, be that as it may, certainly the Government cannot advance a theory of corporate tax evasion to a jury in 1953 and win on it, and then rightfully persuade the Supreme Court in 1963 to uphold the jury's verdict of corporate evasion because what was really involved was individual tax evasion. Nor can the verdict be upheld on any theory that the jury thought these payments were both corporate *and* individual income on any notion that the payments were "constructive dividends"; not a trace of such theory was ever put before the jury in this case.

We respectfully suggest that if justice is to be done the Department of Justice should be afforded an opportunity to answer this Petition and to inform the Court if we have stated any inaccuracy in what has just been pointed out.

It would be an anomalous thing to have a jury in the pending conspiracy case hear, within the next few months, whatever evidence the Government has, including Huebner's "new" evidence, and arrive at a conclusion, as we assert the fact to be, *that the only individual who got any personal money out of these transactions was Huebner and that Shotwell, Cain and Sullivan were innocent*, while this Court permits a conviction to stand on a precisely opposite theory.

We now direct attention to the pending conspiracy case:

THE ASSERTED FACTS UPON WHICH THE PRESENT OPINION IS BASED WILL BE TRIED OUT IN THE COMPANION CONSPIRACY CASE NOW AWAITING TRIAL AND WILL BE EVALUATED BY A JURY IN THAT CASE.

During the "re-investigation" of *this* case a grand jury was empaneled. On February 27, 1957, it brought in an indictment against petitioners Sullivan and Cain, accountant Busby, and Revenue personnel Sauber and Johnson, alleging they had conspired to conceal the "*receipt, utilization and disposition of taxable income*," *emanating from Lubben, by Sullivan, Cain, Huebner and Shotwell, during 1944, 1945 and 1946.* This is the precise issue to which the present opinion largely is directed.[6] To demonstrate the identity of theory of the instant opinion and of that indictment we set forth relevant excerpts from the latter as Appendix B hereto.

There is no way, so far as we see, by which reassessment of the essential evidence of this case can be avoided by the Government, petitioners or the other defendants in the companion case. Any of the parties to that case can insist on a trial. If this reassessment must take place, is it not consistent with elementary principles of justice that it be in the case that has proved to be the root of the trouble? *If* the Government's case is sound it will lose nothing. *If* its case is not sound it deserves to lose.

If this petition should be denied and the present convictions be allowed to stand, trial of the companion case will afford petitioners a chance of retrieving, to some degree, their names and reputations. However, they should not be required to prove their innocence through a secondary trial. American justice should afford them that opportunity in the proceeding in which the Lubben perjury was first proffered against them.

6. This indictment was referred to during the first appeal here. Full copy of it appears as an appendix to Brief for Respondents, No. 1, O. T. 1957.

I.

Confessional Material.

It is difficult to believe that American justice can rest comfortably with the doctrine that an admission or confession which admits an exaggerated degree of crime (amount of unreported *gross* income), *and which never would have come into existence but for an official promise of immunity from prosecution*, can be admitted against the confessors in a subsequent criminal trial.

Yet that is the holding of Part I of the present opinion. It is difficult to read the opinion without concluding that the majority was influenced by its belief, unwarranted by the evidence, that petitioners had set out fraudulently to conceal the receipt of large amounts of individual income. We have tried to show in what has gone before that the discrepancy between Huebner's new evidence and Lubben's old evidence is many times greater than the Court believed, and that what Huebner falsely claimed Cain and Sullivan put in their pockets *actually had to go into the Shotwell corn box to finance the very large purchase of raw corn*. But we now address ourselves to the legal questions.

In deciding whether confessional material may be used two separate questions must be answered. So far the Court has answered but one. Those two questions are:

1. Is the confessional material barred from use because secured in violation of the Fifth Amendment's protection against incrimination?

2. Is the confessional material barred by any common law rule or by the conception of "due process" which excludes confessional material induced by promise of immunity?

Wigmore at p. 249 of his 3rd Edition describes precisely the present posture of Shotwell:

> "Thus, where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised; while it may be inadmissible on both grounds."

The Court has presently decided that here the disclosure documents are "admissible so far as the privilege against self-incrimination is concerned."

While acknowledging the attention given to the "privilege against self-incrimination" question in the opinion, we urge that *Wigmore* points out "that the theory of confessions has no connection with the theory of this privilege. . . ."

Time after time this Court has excluded confessions on the ground of the privilege against self-incrimination even though recognizing that the confession was probably *true*. *Rogers* v. *Richmond*, 365 U. S. 534 and *Lisbena* v. *California*, 314 U. S. 219, 236 are instances in point. In so doing the Court was striking at impermissible methods of obtaining evidence. *But never before has a confession been held admissible because it was partially false.* Confessions induced in whole or in part by promises of immunity should be, and classically have been, excluded, not merely because the law frowned upon the method used, but because such confessions are probably untrue.

In our brief (pp. 71 and 72) we relied upon *Wigmore* but fear we did not quote sufficiently from his work. *Wigmore* says (p. 250) that "The confession-rule aims to exclude self-incriminating statements which are false, while the privilege-rule gives the option of excluding those which are

true." What happened in the case at bar is undeniably clear. *Petitioners, to obtain immunity, gave a self-incriminating statement which was false in that it confessed the receipt of a substantial amount of money that Labben in fact did not pay.*

There are many parts of *Wigmore's* treatise we think are of direct bearing on the issues. We select the following from the third edition which we believe particularly pertinent as the case now stands:

Wigmore, on Evidence, 3d Edition, Pg. 331-333:

"6. Existence of the Inducement (Subsequent Ending, etc.)

"§853. General Principle. The exclusion of a confession necessarily assume (1) that the inducement, if it operated at all, was likely to produce a false confession, and (2) that it did in fact operate upon the mind of the person. The question arising under the first of these elements—the *nature* of the inducement—having been examined, it remains to notice those arising under the second,—the *existence* and *operation* of the inducement. Where an inducement sufficient to exclude any confession obtained by it has been offered, the question often arises whether a confession subsequent in time to the inducement was in fact influenced by it.

"It must be remembered that no attempt is ever made to investigate the *actual* motives of the person confessing, or the part played by the inducement among other motives. The whole theory of inducements rests on the *probable* effect, not the actual effect, upon the person. If while that inducement is held out a confession is made, no inquiry is ever made into the exact share of influence which the inducement had in evoking confession."

Pg. 249-250:

"Finally, a confession is not rejected because of any connnection with the *privilege against self-crimination.*

The circumstances that this privilege protects against a disclosure which is compulsory, and that one of the tests for a confession is whether it is voluntary or not, have naturally led to the occasional use of both arguments at once by counsel in opposing the use of such a confession; but the Courts have properly kept the two principles distinctly apart. Thus, where a compulsory disclosure is offered, it may be admissible so far as the privilege against self-incrimination is concerned, and yet the question of its propriety as a confession may be raised; while it may be inadmissible on both grounds. Moreover, where the privilege has been violated, there is no need of resorting to confessional principles to exclude it, since the theory of the privilege itself suffices to prevent the use of evidence obtained in consequence of such a violation (*post*, §2270). Finally, that the theory of confessions has no connection with the theory of this privilege is shown by the prevailing doctrine that testimony obtained by the violation of the privilege cannot be objected to as such unless it is being used against the person thus disclosing (*post*, §2270). The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*. The two are complementary to each other, in that respect, and therefore cannot be coincident."

Pg. 251-252:

"The term 'a promise or a threat', as well as the term 'voluntary', are also misleading in another way; for they obscure the fact that (even when threats are used) the situation is always one of choice between two alternatives,—either one disagreeable, to be sure, but still subject to a choice. As between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is none the less voluntarily chosen. The term 'voluntary', then, as describing the absence of the vicious element which excludes a confession, is, in ultimate exactness, unsound. All conscious verbal utterances are and must be voluntary;

and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is voluntary, but the false confession is associated with a prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it.

"In general, then, the position of the confessing person which causes our distrust is that of being compelled to *choose between two alternatives*, one of which involves a confession of guilt irrespective of its truth or falsity."

a. The Falsity of the Confession:

The majority criticizes the "confession" here as being false (but not entirely so), with respect to its statements of outgo. But it is not denied, that it was also false (but not entirely so), in its admissions with respect to the receipt of an exaggerated amount of gross income.

It is the very falsity and *probable* lack of probity of material induced by promises of immunity that bans its use under the confession rule. Here we have a case not of *probable* but *actual* falsity. Government witness Graflund testified that the compilors of the confessional material put everything in at the top price whether right or wrong for the simple purpose of trying to have the summaries of income "tie into" and "jibe" with Lubben's "exaggerated" papers (App. 1245-7; see also App. 797-800, 967-8, 1063).

This confession indisputably was "exaggerated" in its statements both of income and outgo. This is the exact phenomenon which the common law says is likely to occur when promises of immunity are made. It is the very reason that confessional material obtained in this way is

inadmissible. (See *Wigmore* 3rd Ed. 2d 822.) Yet, such material, which would never have come into existence but for the lure of immunity; and which admits receipt of substantial amounts of gross income that none of petitioners obtained, has been used as a "main arch" to encompass their convictions.

b. The Weighing of the Inducement:

The opinion seeks to weigh the *inducement* of the voluntary disclosure policy upon petitioners, and concludes (1) any governmental inducement of immunity was conditionally offered, for only honest disclosures both of income and outgo were invited, and (2) even such inducement was *constructively* withdrawn *by the Government* once there was an attempt to deceive in part.

However, once this Court accepts that the petitioners were at all induced by the government's public offer of a way to avoid prosecution, the common law confession-rule does not permit the Court to weigh the *actual* effect of the initial inducement.

Perhaps a court may attempt to analyze the motives of confessors in endeavoring to decide whether they were *forced to incriminate themselves*, but it should not do so in deciding whether the confessional rule applied. *Wigmore* says in Sec. 853:

> "It must be remembered that no attempt is ever made to investigate the *actual* motives of the person confessing, or the part played by the inducement among other motives. The whole theory of inducements rests on the *probable* effect, not the actual effect, upon the person. If while that inducement is held out a confession is made, no inquiry is ever made into the exact share of influence which the inducement had in evoking confession."

c. Compliance With Disclosure Policy and Inducement Are Separate Questions:

Accepting the opinion's factual predicates, it says that because petitioners did not fully reveal Shofwell's (and the individuals') *believed civil liabilities*, they did not comply with the Treasury's disclosure policy so as to be entitled to *immunity; ergo*, although petitioners would *not* have "confessed" *but for the promise of immunity*, they were not induced to confess.

The syllogism plainly involves a *non sequitur* because petitioners' failure to comply with the disclosure policy does not mean they were not *induced* by the policy's promise of immunity. Or, stated another way, the opinion commingles the question of whether immunity was earned with the separate question of inducement of evidence.

Whether petitioners fully complied with the disclosure policy is one question; whether the promise of immunity induced them to surrender confessional evidence is quite another. The latter is the only question involved.

The opinion (p. 6) concedes that petitioners' revelations of unreported, "exaggerated" gross income "might not have been made in the absence of the Treasury's offer," but (p. 8) that the inducement was not "unlawful inducement"; that petitioners attempted to hoodwink the Government into a "*flagrant misapplication of its lawful disclosure policy*" (p. 10). We italicize the last quotation because it demonstrates, we believe, that Part I of the opinion starts out to decide a question *as to admissibility of evidence* but *concludes with deciding that immunity was not earned*. Such a conclusion does not lead to, or justify,

a further conclusion that incriminatory evidence that never would have existed save for the promise of immunity may be introduced in a criminal trial.

Striking though the differences appear to be between the majority and dissenting opinions, it is to be noted that *both opinions agree that Bram v. United States*, 168 U. S. 532, *states the governing principle*—any confession "obtained by any direct or implied promises *however slight*" is not admissible. It is, therefore, possible, *once the question of admissibility of evidence is clearly separated from the question as to whether the believed conditions subsequent of the disclosure-policy were complied with*, for a majority of the Court to unite upon what is the obvious fact of this record, that a promise of immunity, considerably more than slight, caused this "confession" to be made.

d. The Effect of "Voluntary" Action Under the Confession Rule:

Under the confession rule it is no answer to say, as the opinion does, that petitioners went to Internal Revenue "voluntarily". As *Wigmore* says at pp. 251-252:

> "The term 'voluntary' then, as describing the absence of the vicious element which excludes a confession, is, in ultimate exactness, unsound. All conscious verbal utterances are and must be voluntary; and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of a false confession is a natural one under the conditions. The choice of false confession is voluntary, but the false confession is associated with the prospect (namely, of escape from present harm) so tempting that it is not in human nature to resist it."

The foregoing well describes what has happened to the petitioners here. The Court believes that false material was prepared by petitioners with the "prospect" of there-

by escaping from "present harm"; but the opinion instead of progressing on to the logical conclusion that such material is excluded as untrustworthy for age old reasons that human nature will join confessional and exculpatory material without regard to the precise truth, to try to win proffered immunity, concludes just the opposite, *that its untrustworthiness makes it admissible*.

Neither the majority nor the minority opinions discuss the suppression question except viewed from the Fifth Amendment's privilege against self-incrimination. A full consideration of the common law confessional rule is justified upon a Petition for Rehearing.

We pointed out the existence of a confessions rule problem in our brief (pp. 72-75) and reply brief (p. 21), but regret that we did not stress it sufficiently then, or in our oral argument.

The question of voluntariness, if it may be raised at all, is a question for the jury:

In *Smith* v. *U. S.*, 348 U. S. 147, 155, this Court held that where, after denial of a defendant's pretrial motion to suppress evidence on the ground that it had been procured by fraud and deceit, the Court submitted the issue of voluntariness to the jury, that this question "* * * was properly submitted to the jury". In *Wilson* v. *U. S.*, 162 U. S. 613, 624, this Court said that if there is a conflict as to voluntariness of a confession that "* * * if the Court decides that it is admissible, the question may be left to the jury * * *".

The dissent here points out far more effectively than we can, that ultimately questions of this kind should be for the jury. All we can add to what the dissent says is to point out that in this case the jury never had a chance to decide whether the so-called confessional material here was "voluntarily" given. On the contrary, *the fact that petitioners had made a disclosure was turned into a tool*

for conviction: The Court instructed the jury, not merely that whether immunity should be granted because of any "so-called disclosure" depended upon facts they were not to decide, but that from the fact the defendants were on trial it would necessarily follow that any "alleged disclosure" had not freed them from prosecution (R. 2969); that:

> "The so-called disclosure policy of the Government which may have been evidenced by certain statements of the Treasury Department was primarily promulgated for the purpose of obtaining from various defrauding taxpayers confessions of their fraudulent attempts to defeat their income tax, and to make a disclosure to the Government of such fraud, and to honestly disclose the amount of the tax due, and to aid and assist the Government in all matters pertaining thereto. Whether a disclosure policy of the Government in order to grant them immunity from criminal prosecution has been made, is a matter for the Court to determine and not for the Jury, and the only purpose, the only purpose of admitting any testimony regarding any alleged disclosure of the defendants with respect to their income tax for 1945, and 1946, *is to enable the Jury to understand that the defendants contend that they attempted to make a disclosure and that certain statements and admissions were made to the Government on the assumption that they had made a disclosure.*
>
> "Consequently, any reference to any voluntary disclosure may be considered by you only in so far as it may throw light or bear upon the conduct of the parties during the time that the alleged disclosure was made, and whether they intended to violate the income tax laws.
>
> "The fact that the defendants may have assumed that their disclosure granted immunity to the Shotwell Company, and to the individual defendants herein, is no defense in this proceeding, and as I have stated, and I repeat again, it is only material in so far as it may bear upon the intent of the individual defendants, or

> the intent of the Shotwell Company to violate the income tax laws, and their good faith, or lack of good faith in doing that, which they did do in reference to their alleged disclosure, * * *".

e. A Specific Offer Was Directed to Petitioners: Effect Under the Privilege Rule:

Footnote 10 states "a quite different case would be presented if the offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution". The Footnote believes that if a person under such "investigation, accusation, or prosecution" turned in material in such an environment it would have been inadmissible under the *Bram* test, [and] * * * "the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility".

The Court has overlooked that the District Court *did* find that such an offer of immunity *was* made to petitioners, in the context of an investigation, which they themselves had requested, and that they *were* told to turn in confessional material in order to avoid criminal prosecution. The District Court found (App. 1761):

> "It is fair to find from the evidence that Sauber informed Busby, as well as Cain, * * * to disclose the entire black-market premium receipts and to make a computation of all the alleged off-setting premium disbursements which Shotwell allegedly made for raw materials. And it is entirely probable that Sauber informed Cain and Busby that if they made an honest, bona fide voluntary disclosure there would be no criminal prosecution. * * *"

This was an offer "specifically directed to the petitioners" and "in the context of an investigation" just as surely as if petitioners had been standing before a police station sergeant. In the "context of an investigation" by Internal

Revenue, the police sergeant was not dressed in blue, but was personified by the Revenue Official. Under those facts, which existed here, "The truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility." (Footnote 10.) Thus even under the 5th Amendment privilege rule there is ground for reconsideration and for a holding that the confessional documents, true or false, were not admissible.

If an Executive agency chooses, as did the Treasury, to make several statements of its policy, not wholly harmonious, must the citizen cull them over and rely only on the one least advantageous to himself as the present opinion implies (p. 7 and note 7 contrasted with dissent p. 13)?

Is it not necessary, if constitutional protections are to be preserved, to hold that when an Executive agency begins with lavish, unrestricted promises of immunity, it does so at its peril and with its eyes open, so far as use of self-incriminatory admissions thereby obtained may subsequently arise in a criminal trial?

And with the federal government, as vast and ramified as it is today, bidding to become more so, and peopled only by fallible human beings, it is essential that the courts jealously guard, and perhaps increase, the people's protections against their servants rather than to diminish them.

II.

LUBBEN'S PERJURY AND THE NECESSITY FOR A NEW TRIAL.

There are two underlying factual assumptions for the present opinion denying petitioners a new trial, despite Lubben's wilful "exaggeration" to the jury. They are, *first*, that there was not too great a disparity between the showing made on the new hearing and Lubben's original testimony. This we have demonstrated to be a gross misconception. The *second* erroneous assumption is that the District Court "did not abuse its discretion" (p. 13) in denying a new trial because it "did not initially address itself to the question whether Lubben's trial testimony was perjurious and * * * *was not asked to do so until after its opinion denying suppression had come down*" (p. 11). This assumption is equally erroneous:

While it is true that the District Court, on the new hearing, did not *initially* address itself to the question whether Lubben's trial testimony was perjurious, that was not because petitioners failed to request it so to do.

There has been no point in this lengthy controversy at which petitioners did not stoutly insist that Lubben was a liar and a scoundrel; *and such he surely has been found to be by other prosecutors and other judges* (see our orig. br. p. 87, opinion n. 17, and dissent n. 28). Sauber in substance was told this during the disclosure process (R. 2593); the lengthy cross-examination of Lubben on the jury trial went to the point (R. 978, *et seq.*); as did the arguments to the jury (R. 2886, 2887, 2890, 2895, 2898, 2902, 2910, 2911, 2914, 2915, 2936). Judge Nordbye well recognized from the outset that Lubben's character and credibility was a central issue, he instructed the jury that the defense contended Lubben's figures were "greatly ex-

aggerated" (R. 2964); eventually he said in 1954 that he, and the jury, believed Lubben; on post-trial motions he chided petitioners for attacking Lubben (R. 3018, 3073).

On the 1955-1957 appeal proceedings (the records and briefs of which were furnished to the District Court), petitioners repeatedly denounced Lubben as the congenital perjurer he is (see for example p. 5, Br. for Resp. No. 1, O. T. 1957).

During preliminary arguments in 1958 before taking of evidence on the new hearing, petitioners again asserted to Judge Nordbye that Lubben lied (App. 70, 90, 91). Government counsel then admitted to the court,

> "It has been their contention from the outset * * * that the Government's principal witness Lubben was the villain and a perjured Government witness." (App. 304.)

When the new hearing started the District Court remarked that Government counsel had been "forewarned" that through Huebner they might prove "*what perjuring Lubben did*". (App. 573). Extensive portions of the examinations of Graflund and Huebner on the new hearing went to this point. On argument at the close of the reopened hearing the point was made bitterly clear (App. 1689, 1716):

> "Now, *if the Court could see fit to revise its thinking*—Lubben has been declared a perjurer by the United States Department of Justice * * *. Lubben * * * is one of the world's most consummate and skilled liars * * *. They want these convictions affirmed. *They are trying to send people to the penitentiary on knowingly perjured evidence* * *." (App. 1689.)

The argument was replied to in rebuttal (App. 1744).

True, a formal motion for a new jury trial because of Lubben's perjury was not made until after the District Court again had denied suppression. Such motion, prior

to the new ruling, well might have been held premature. But the contention that Lubben was a perjurer and that petitioners had been convicted on "exaggerated", false evidence was made throughout the case.

We respectfully suggest that a majority of the Court will find it impossible, consistently with the record, to adhere to an opinion which erroneously states that the District Court was not asked to address itself to the question of Lubben's perjury until *after* its opinion denying suppression had come down. The record forbids such a statement.

Any notion that this Court can affirm on the theory that the District Court was not given a fair opportunity to deal with this question is without foundation. The fact is that Judge Nordbye made a monumental blunder in 1953 in concluding that Lubben was a pretty decent chap who temporarily had fallen into bad ways but had reformed (R. 3018, 3073). When petitioners in 1958 asked the District Court to reverse his thinking, to recognize Lubben as the utterly amoral, perjuring swindler he is, they asked more than the District Court could bring himself to do—he was not prepared to admit that he had been so completely fooled by Lubben in 1953 and had erred in not being governed by the testimony of outstanding, responsible Chicago citizens that they had known Cain and Sullivan for years and that they were men whose testimony should be believed (R. 2686-2704).

Proceeding upon the unfounded assumptions that there was but a "more apparent than real disparity" between Lubben and Huebner and that petitioners themselves were not enough impressed with Lubben's perjury to have raised an issue as to it before Judge Nordbye until *after* his second ruling on the suppression issue, the opinion at page 15 reduces the entire matter to one of a mere "subsequently discovered inaccuracy in the testimony of a wit-

ness." It is, for all of the reasons pointed out in the dissent and because of the facts we have tried to drive home in this petition, far more:

The Government presented, in the same case, but at separate times, two star witnesses for whom it vouched. One told one story and the other told a story which drastically contradicted the first. This Court presently holds that the first witness can be used to win for the Government before the jury; the second witness can be used to win for the Government before a court; but never the twain shall meet.

All questions of credibility and extent of the variance produced by a witness so important that this Court ordered an unprecedented new hearing are to be resolved solely by a judge who alone decides the extent of the inconsistencies, and alone decides whether the stories of the two witnesses when put together demonstrate that petitioners were fraudulent.

Article III, Section 2, clause 3 of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *" The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *" But here petitioners have not had a trial on all of the evidence that the Government says is relevant and vitally important. On all of the evidence they have had only a bench trial, and by a Judge from out of their own district who was not equipped to decide, for example, the proper weight to be given to the testimony of important Chicago witnesses testifying as to petitioners' good reputation and credibility in a case in which credibility was vital.

Credibility is for the jury. *Glasser* v. *U. S.*, 315 U. S. 60, 80 (1942). In *White* v. *U. S.* (CA 4 1960), 279 F. 2d 740, at 747 the Court said it is:

> "an age-old proposition that it is for the jury, not the court, to pass upon and determine the credibility of witnesses . . ."

Even under the opinion's figures, much more those we have endeavored to explicate in the opening of this Petition, the Government's admitted contradiction of Lubben should be high enough to require a jury to pass on Lubben's credibility. In *U. S. v. Vardine* (CA 2, 1962), 305 F. 2d 60, there was an error by a government witness computing net worth of $1,999.00 out of a total of $13,922.00, and a new trial was ordered, the court saying:

> "While the 1953 error of $1,999 is small in comparison to the 1953 bulge of $13,922 shown on the government's net worth summary, it is impossible to tell how many of the factual questions the jury decided in the defendant's favor. In view of the other items in dispute, the $1,999 error might, therefore, have accounted for the entire 1953 bulge as it was found by the jury or it might have been sufficiently material in relation to the bulge found by the jury so that we should not second guess whether they would have convicted on this count. *See Flemister v. United States* (58-2 USTC ¶9904), 269 F. 2d 513, 517 (5 Cir. 1958)."

Similarly, in *U. S. v. Flemister* (5 Cir. 1958), 260 F. 2d 513, 517 a new trial was ordered because on a motion for a new trial defendant showed that a government witness had not shown an off-setting credit of $3,500. This was newly discovered after trial; for failure to give a new trial to show those facts to a jury, the case was reversed.

The dissenting opinion here points out (p. 23) that the Court is "wrong" in stating that the *Mesarosh* case may be distinguished on the ground that the conviction there may be regarded as, or was conceded to have rested on perjured testimony. A re-reading of *Mesarosh*, we submit, will persuade the Court that the dissent's criticism is valid, and, moreover, should persuade a majority of the Court (see 352

U. S. at p. 9) that the *Mesarosh* decision did not turn upon any question of technical perjury but simply upon the untruthfulness of important evidence.

If the present opinion means that even though there is a post-trial discovery that the star witness for the Government has told very serious untruths, nevertheless a conviction obtained thereby must stand unless there be either a technical finding of perjury (which necessarily would have to be made in a collateral proceeding), or unless the prosecuting officials concede that their star witness perjured himself (a thing not often to be looked for regardless of circumstances), it has deeply lowered Federal standards of integrity. We hesitate to believe that the Court actually means that in all instances before a new trial can be obtained because of untruthful Government evidence there must be a technical finding of perjury. "Surely 'justice requires no less,' * * * than * * * that a criminal conviction not be based on the testimony of untruthful or inaccurate witnesses". (Brennan, J. dissenting in *Pittsburgh Plate Glass Co. v. U. S.*, 360 U. S. 395, 407.)

No one can possibly say that if Lubben had confined his testimony, when before the jury in 1953, to something in line with the limits set by Huebner, who was vouched for by the Government in 1958, that the jury ever would have convicted petitioners.

The Crushing Effect of "Exaggerated" Affirmative Evidence Coupled With an "Exaggerated" Confession.

Legal arguments and constitutional niceties laid aside, we beg the Court to observe that the effect of Lubben's "exaggerated" affirmative evidence upon the jury cannot be considered in compartmentalized detachment from the "exaggerated" confession which petitioners had given, believing they did not face a criminal trial. As the Government admitted on the first appeal, its case to the jury depended on "two main arches," (1) Lubben's "exaggerated" testimony and (2) petitioners' "admissions", exaggerated, to avoid controversy and to achieve immunity, to fit Lubbeh's "exaggerated" claims.

While it might be said, although we think improperly, that error in either "arch" alone would not be sufficient to warrant a new trial, it cannot be said, we submit, consistently with justice, that citizens have been fairly convicted when the case against them was (1) "exaggerated" affirmative testimony, and (2) an "exaggerated" confession tailored for civil purposes, to fit the "exaggerated" affirmative claim. What chance, under such circumstances, did petitioners have?

We pray the Court to reconsider, for here were two directly related errors which marched hand in hand to doom petitioners. Prejudice is to be determined by viewing the record in its entirety. (*Kotteakos* v. *United States*, 328 U. S. 750, 764).

III.

ABUSE OF THIS COURT.

The Court has decided to excuse obtaining an order of remandment from it by withholding sworn testimony that utterly destroyed or exposed the falsity of many important allegations on which this court acted, on the ground that such withholding was merely "a mistake of judgment on the part of the Government." The Court is charitable.

The opinion says the issue tendered by the motion to remand was not whether the Government's new evidence "was true or false, but whether it warranted a re-examination of the suppression issue by the District Court." But whether it "warranted" further proceedings depended on its reliability and what it was worth in its "true colors." This Court had to make a determination of its worth. It determined, without the faintest knowledge that the affidavits tendered to it were, to the knowledge of the prosecutor, "glaringly inconsistent" with grand jury evidence given by the same affiants a few weeks or months before, were worthy. Certainly, in a trial court prosecutors are not permitted so to conduct themselves. *United States* v. *Zborowski* (2 Cir.), 271 F. 2d 661, 668 says that a prosecutor must disclose to a defendant that a prosecution witness had given contrary grand jury testimony for "our standards of fair play in Federal criminal proceedings require that the Government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness * * *."

The Court has not agreed with our contentions on this head, but to say that they were "utterly extravagant" is to visit criticism on the undersigned we do not believe we are rightfully entitled to and is to give the prosecution an inferential accolade it certainly did not earn.

IV.

JURY SELECTION.

That the grand and petit juries were illegally composed admits of no serious contradiction.

Petitioners' objections are disposed of on the grounds of (a) tineliness, and (b) the statement (p. 21, n. 25) that: "It is not suggested that the contentions made here go to the individual qualifications of any seated grand or petit juror." In the latter statement the Court has gravely misapprehended both our position and the record. We do so assert. 9 of the seated grand jurors were volunteers *and thereby personally and individually disqualified* under the Illinois statute which had to be complied with in selection of this indicting grand jury; 1 of the petit jury was *similarly personally disqualified;* numerous others were recommendees of former grand jurors and undoubtedly several of them in fact had volunteered to their sponsors. See table of the juries appearing as Appendix D of Petitioners' brief.

We respectfully request that the jury points be re-examined for the decision cannot accurately rest on the assumption that personally unqualified persons did not serve on these juries.

V.

(a) The Lubben Testimony About Sullivan.

The Opinion (p. 22) states that Lubben's original testimony was "he had a conversation with Sullivan on or about February 14, 1946, concerning the advisability of paying the Black-Market overages by check." The effect of Lubben's recantation was to abandon completely any pretense he had any conversation *at any time* with Sullivan

about checks. Lubben said the *February* conversation *did not* take place; and in the fall:

> Lubben at R. 921: "* * * it wasn't in regard to those three checks * * *"
>
> At R. 921: "* * * it was not with reference to the checks * * *"
>
> At R. 922: "* * * it wasn't in regard to the checks * * *"

Lubben did not specify what was said in what he simply identified as "the conversation" with Sullivan in the fall (R. 921). Such abandonment of subject matter is a substantial recantation; yet it is the only testimony Lubben gave at all against Sullivan.

(b) The Roeser Testimony About Sullivan.

The Opinion at p. 23 believes Roeser turned over cash money to Sullivan. Roeser's testimony is to the contrary (R. 1721):

> "Q. Did you ever give any money to Sullivan?
> A. I don't believe so."

(c) The Ericson Testimony About Sullivan.

The Opinion at p. 23 believes Ericson got "instructions" from Sullivan. Ericson's testimony was that Sullivan *never* gave any instructions to him (R. 1818) and indeed Ericson *never* had any conversations with Sullivan relative to the operation of the business (R. 1820).

Nothing in the District Judge's opinions either on Sullivan's motion for acquittal (R. 3250-6) or for a new trial (R. 3268-75), supports the Opinion's conclusions of fact as to Roeser and Ericson in (b) and (c) above.

The District Judge's opinions note the "paucity" of evidence against Sullivan, and almost entirely rely on Lubben's recanted testimony. We thus approach the in-

structions in the framework of the jury trial having been a "close" case against Sullivan—the District Judge requested briefs on the motion for acquittal after oral argument, and studied it for six weeks.

(d) The Instructions.

The Opinion apparently concedes the instruction quoted at Opinion p. 24, standing by itself, was error. It was plain error for the Court to instruct the jury specific evidence "should be considered by you" to determine the "intent of the parties to wilfully violate the income tax laws or their good faith, or lack of good faith in the matter", which evidence, the Opinion states: "was not * * * admitted against Sullivan and should not be considered against him" (p. 24).

It was emotion charged evidence this instruction told the jury to consider to determine Sullivan's intent to commit the crime: Cain's so-called disclosure "admissions" and the disclosure documents. Other instructions had the same vice of recalling to the jury's mind evidence heard weeks before and telling them to weigh it all against all defendants, though it was not in evidence against Sullivan. Much of the evidence which the Majority Opinion finds damning was never admitted—and often not offered—against Sullivan but the instructions listed all that evidence, seriatim, and told the jury to consider it against *all defendants.**

* (a) Lubben's hearsay that the money went into petitioners' pockets was not admitted against Sullivan (R. 804, 814-5, 822) but 28 days later the jury was instructed to consider that evidence to determine "the issues in this case" (R. 2967-8); (b) Cain's cross-examination on the prior suppression hearing was not offered as to Sullivan (R. 1873, 1881, 1889) but was described as admissions by Cain the jury were told to consider against all (R. 2969); (c) conversations about checks were not admitted against Sullivan (R. 1893), but were recalled to the jury for use against Sullivan (R. 2953); (d) oral testimony about overages which was not admitted against Sullivan (R. 2984) was summarized as government evidence against all defendants (R. 2855-6).

Evidence which influenced this Court's opinion, likely influenced the trial jury, so prejudice from the instructions is demonstrated.

If we presume that "the jury conscientiously observed" (Op. p. 25) the instructions, we must presume they decided Sullivan's fate on prejudicial evidence (1) which was not admitted against him, and (2) much of which was never even offered against him.

The "Limiting" Instruction.

The Opinion believes this error was cured by a "limiting" instruction. That instruction said a "statement" or an "act" "is not binding" and is not "competent evidence" against "the absent defendants" if it occurred "not in the presence" of that defendant, or "in the absence" of that defendant.

The Cain testimony on the suppression hearing had been given in open court, "in the presence of" Sullivan. Under the "limiting" instruction that would make it admissible against Sullivan, but the Government did not offer it against anyone but Cain and the Corporation (R. 1869, 1881, 1889, 1938). Under the "limiting" instruction the jury would think they could use that evidence against Sullivan, especially when a specific instruction told the jury they *could* consider against Sullivan "the testimony regarding Cain's alleged admission as to the falsity or incompleteness of these tax returns". This was a clear instruction that the admissions of another were "testimony [which] should be considered" against Sullivan to determine—not some insignificant point—but his "intent * * * to wilfully violate the income tax laws * * *."

Thus, while the "limiting instruction is clear" (Op. p. 25) it clearly did not nullify the specifically bad instruction, and therefore did not cure the error even if it "be

presumed that the jury conscientiously observed it" (Op. p. 25).

Cautions During the Trial

The Opinion advances a second reason why the jury's deliberations would not have considered against Sullivan the evidence the bad instruction told them was to "be considered by you" against "the parties." The Opinion believes "The trial judge repeatedly cautioned the jury throughout the trial" that some evidence was not admitted or to be considered against Sullivan (p. 24).

The ruling that the disclosure documents were not to be considered against Sullivan was almost solely on one day out of weeks of a trial which had 75 witnesses and hundreds of exhibits (R. 2589, Oct. 9, 1953).

The ruling the Cain admissions were not admissible against Sullivan was made *out* of the presence of the jury (R. 1873) *after* it had been sent home for the day (R. 1870). When the jury came back the admissions were read with *absolutely no cautionary instructions at all to the jury limiting them as to* (R. 1941).[7]

The prosecutor in his Reply Argument to the jury (too late for answer, R. 2940) argued the disclosure documents and Cain's admissions indiscriminately against *all* defendants.

The factual situation was therefore that items excluded as to Sullivan long before the jury retired to consider their verdict were recalled to their mind by graphic descriptions of that very evidence by the judge, and the jury was told to consider that evidence against *all* defendants.

To such a factual situation the sole citation in the Majority Opinion (*United States v. Harris* (CA 7, 1954), 211 F.

7. This in itself was reversible error (*U. S. v. Kelinson* (CA 2, 1952), 205 F. 2d 600, 601).

2d 656, 659. Cert. denied 348 U. S. 822) has no application. In that case the 7th Circuit noted "the Court's instructions to the jury are not a part of the record before us" so the Court of Appeals assumed the instructions were correct and conscientiously followed by the jury. *Harris* did not presume to deal with a factual situation involving conflicting instructions, nor did the two authorities upon which it relied: *U. S. v. Spadaford* (CA 7, 1950), 181 F. 2d 957 where the court said at 959 "defendant does not complain about the instructions"; and *U. S. v. Sorcey* (CA 7, 1945), 151 F. 2d 899 which holds the jury would be presumed to have observed "the instructions of the Court" rather than a marshal who went to the jury room door. In our factual situation the applicable 7th Circuit decision would more nearly be *U. S. v. Donnelly* (CA 7, 1950), 179 F. 2d 227, 233: "where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error."

Such a rule is followed by the 3rd Circuit: *Nicola v. U. S.*, 72 F. 2d 780, 787 "when an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn"; the 5th: *Patterson v. U. S.*, 183 F. 2d 687, 690; the 6th: *Smith v. U. S.*, 230 F. 2d 935, 939; the 8th: *McLean v. U. S.*, 253 Fed. 694, 696; the D. C. Cir.: *Byas v. U. S.*, 182 F. 2d 94, 98.

Mills v. U. S. (1918), 164 U. S. 644, laid down the rule reversing for conflicting instructions. In so ruling this Court rejected the thesis of the Majority Opinion here that error is cured if "it may be claimed that other portions of the learned court stated correctly the law" because "which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine" (p. 649).

Where there was, as at bar, one specific charge which was erroneous, and another charge which was correct, but general, conviction was reversed in *Bollenbach* v. *U. S.* (1946), 326 U. S. 607, 612: "If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." This warning was thought especially applicable to a case (such as Sullivan presents) where instructions permitted a jury to consider evidence against a defendant which was not admitted against him, in *Kotteakos* v. *U. S.* (1946), 328 U. S. 750, 776, and in *Delli Paoli* v. *U. S.* (1957), 352 U. S. 232. In the latter case the conviction was only upheld (against a dissent by Justices Frankfurter, Black, Douglas and Brennan) because petitioner conceded the clarity of the protecting instructions (p. 240).

Rulings of inadmissibility made during the trial are not enough. In *Anderson* v. *U. S.* (1948), 318 U. S. 350, at 356 there was a reversal because "while the trial judge appeared to admit the confessions 'only to be used against the persons who made them,' his charge bound the jury to no such restricted use of the confessions." *Lutwak* v. *U. S.* (1953), 344 U. S. 604 holds that the trial judge must make plain to the jury the limitations on use of the proof *both* "at the time of admission and by its instructions. * * *."

The instructions did not protect Sullivan from use of the excluded evidence by the jury. There is no way to presume the jury did not use it exactly as they were told they might do; if their use of such evidence "even were doubtful" a reversal is required. *Blumenthal* v. *U. S.* (1947), 332 U. S. 539, 551.

Sullivan respectfully asks that *Harris* v. *U. S.*, 211 F. 2d 656, cited to support the Opinion's holding against him on this point, and the authorities cited in this Petition for Rehearing, be re-examined. The present Opinion permits

an erroneous specific instruction to be cured by a generalized limiting instruction. Such a rule is new, and contains enormous potentials for erosion of our system of trials by correctly instructed juries.

CONCLUSION.

We are well aware that this case has been troublesome. The present decision however, we respectfully submit, lays down principles which the Court will find difficult to live with. We do not think that the Court would have arrived at the result it did arrive at, had it correctly understood the facts we have endeavored to make clear here. We respectfully pray a rehearing.

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CERTIFICATE.

George B. Christensen, a member of the Bar of this Court, certifies that the foregoing petition is presented in good faith and not for delay.

GEORGE B. CHRISTENSEN.